

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

HARRY SMITH, JR. and
ROSLYN WOODARD SMITH,
Individually and as Administrators of
The ESTATE OF HARRY SMITH, III,

Plaintiffs,

v.

CIVIL ACTION NO. 04-1254-GMS

JOHN CIRITELLA,

THOMAS DEMPSEY,

and

MATTHEW KURTEN,

Defendants.

PLAINTIFFS' MOTION FOR A NEW TRIAL - PART ONE

Come now the Plaintiffs, by their attorneys, and move this honorable Court for an order granting them a new trial should it find juror misconduct. The basis for this request is that after the jury was discharged Plaintiffs learned the jury verdict had been published by a local news paper almost a full hour before it was announced in open court. [Please see Exhibit 1 attached hereto.]

Publication of the jury verdict by the local press, prior to its announcement in open court, suggests a serious irregularity in the jury deliberation process, e.g., the secrecy and sanctity of jury deliberations might have been breached or the jury verdict is tainted by juror misconduct. This type of irregularity is prejudicial to Plaintiffs, and it undermines the public's confidence in our judicial system.

"Matters which come to the attention of the trial judge after trial has commenced which may affect impartiality on the part of a juror or jurors command careful consideration." *United States v. Rowell*, 512 F.2d 766, 768 (8th Cir. 1975). The proper procedure for a district court to follow when juror misconduct has been alleged is first, to determine whether the misconduct actually occurred and then, to determine whether the misconduct, if any, is prejudicial. *See United States v. Resko*, 3 F.3d 684, 688 (3d Cir. 1993).

Plaintiffs do not know why the jury's verdict was published by a local newspaper before it was announced in open court. Plaintiffs respectfully request the Court conduct an inquiry to determine whether juror misconduct occurred, and, should it find juror misconduct, grant Plaintiffs a new trial.

Respectfully submitted this 26th day of April 2007.

/s/ Anne T. Sulton

Anne T. Sulton

Admitted: Pro Hac Vice

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2007, I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the following:

Attorney John Parkins E-mail Parkins@rlf.com

/s/ Anne T. Sulton
Anne T. Sulton